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December 15, 2017

Via Email - Brian.Sierant@tceq.texas.gov
Mr. Brian Sierant
TCEQ Water Quality Division
P.O. Box 13087, MC-150
Austin, Texas 78711-3087

RE: 30 TAC Chapter 312 Biosolids

Dear Mr. Sierant,

Please accept the attached as written comments from my clients, who are stakeholders in the above referenced matter. I would appreciate you giving favorable consideration and I compliment the commission's efforts to revisit existing rules in an effort to protect the citizenry of the State of Texas and its natural resources.

Please advise if you have any questions or further comments. Please see attached.

Sincerely,

J. Christopher Byrd

JCB/ls

Cc: Justin Kelley; and
Emily Kelley

TCEQ REQUEST FOR STAKEHOLDER COMMENTS

OCTOBER 30, 2017 SOLICITATION RESPONSE	§ § §	30 TAC CHAPTER 312 BIOSOLIDS

In response to an invitation for public comment regarding efficacy or reasons to consider modification to existing rules of 30 Tex. Admin. Code Chapter 312, the undersigned stakeholders offer the following comments:

Requirements to Maintain Buffer Zone under 312.44(c)(2)

The stakeholders are requesting modification of the current Buffer Zone rule which requires a facility owner or operator satisfy the distance requirements of 312.44(c)(2)(D) ("750 feet, established school, institution, business, or occupied residential structure") to require that a facility maintain the buffer distance **at all times**. Otherwise, the rule as written leaves ambiguity in the instance of a post-permit recalculation and interim adjustments which may not be consistently applied for all neighboring land owners at all times.

Position Precedent:

This requested modification is supported by positions precedent established by the Commission. While it may be technically correct to suggest the Commission has never addressed a post-permit case retrospectively requiring recalculation of the 750 foot buffer, the question has been previously pondered and answered. Cited is Executive Director's Response to Public Comment regarding Application by Terra Renewal Services, Inc. for TCEQ Permit No. WQ0004989000 where Executive Director, Ed Zak Covar provided the Commission's position should in the future a structure be built within 750 feet of the proposed land application. Director Covar specifically stated:

> "If in the future an adjacent landowner builds a residence, school, institution, or business with 750 feet of the proposed land application area, the Applicant **must still observe this buffer zone**." [Emphasis added] *See* Executive Director's Response to Public

Comment, Draft TCEQ Permit No. WQ0004989000, Terra Renewal Services, Inc. before TCEQ, Feb. 18, 2003, p. 3, Comment 1 Response 1. (Hereafter "**Terra**")

The Director's response was clearly made to illuminate the spirit and intent of 30 TAC § 312.44(c). Comment 1 addresses the question of when the proposed application area is within the 750 buffer zone and violation of the buffer zone would deny the adjacent landowner the right to develop their property. *Id,* Comment 1. Obviously in the case of **Terra,** the adjacent landowner had not developed their property fully as anticipated and wanted a buffer implemented prior to development. In response, the Director referred to "adequate buffer zones according to the 'Management Practices' section of TCEQ's Sludge rules, found at 30 TAC § 312.44(c)" and stated:

> "Specifically, the TCEQ's rules require applicants to establish a 750 foot buffer zone from the land application area to any 'established school, institution, business, or occupied residential structure'. " *Id,* Response 1.

The Director determined that at the time of the application, there was one structure requiring a 750 foot buffer zone surrounding it and the Applicant was prohibited from land applying any sludge in the application area located inside the applicable 750 foot buffer zone from the one structure. The Director stated the Applicant **currently** meets the requirement of 30 TAC § 312.44(c) [emphasis added] *Id,* Response 1. The Director went on to state if in the future a new structure was built, the Applicant **must still observe the buffer zone**. " *Id,* Response 1. This determination gave the Applicant and the landowner consistent guidance on the application of 30 TAC § 312.44(c) at the present time or in the future should the status quo change. The requested modification would insure the same for all effected land owners who neighbor permit holders.

To illustrate by a more recent example, the undersigned stakeholders built their home after a land application was granted, Registration No. 711013. The permit holders in this case subsequently began applying domestic septage not only within a 750 foot buffer, but directly on the stakeholder's land and well inside their property line and literally on their person. The requirements of 30 TAC § 312.44(c) were

not and are not **currently** being met, even as written. All permit holders **must still observe the buffer zone at all times**.

Argument & Authorities

Permit non-compliance and enforcement:

Registrations are always subject to Best Management Practices (BMPs) including the buffer requirements of 30 TAC § 312.44(c) and the groundwater and surface water protection requirements of 30 TAC § 312.44(g). Clearly an **ongoing compliance is expected**. As cited above and consistent with the Director's reasoning in **Terra,** permits currently issued require **ongoing compliance** with 30 TAC § 312.44(c) yet without the requested modification, some permit holders may feel the ambiguity to empower them to ongoing non-compliance of at least the spirit of the intent of protections offered by TAC § 312.44(c), as written. However, not all permit holders are self-governing.

Prior notice inconsistencies:

The absence of the requested modification has created inconsistencies in dealing with prior notice of future buffer infiltrations. In **Terra**, there was a comment exactly the same logged concerning the future land development intentions cited in the Technical Summary referenced above regarding Registration No. 711013. The comment reads as follows:

> "There are concerns from an adjacent landowner who is planning to begin building a home in 2016 that would be located within the 750 foot buffer zone for an occupied residence." *See* Technical Summary and Executive Director's Preliminary Decision for a Beneficial Land Application Registration was made by Bijaya Chalise of the Commission's Municipal Permits Team on December 7, 2015 and revised January 5, 2016, p. 3, Comment and Response 3.

Remarkably in regards to Registration No. 711013, TCEQ staff did not cite the clear guidance of the Director given in **Terra.** Instead, the Municipal Permits Team **was silent** and simply stated:

"At the time the registration is issued, the registrant must have a minimum 750 feet buffer zone between the land application area and any occupied residence. Based on TCEQ's review of the application, the registrant meets all buffer zone requirements. *Id.*

As seen in the application process of Registration No. 711013 (for example) the absence of the clarity and the requested modification herein permitted the TCEQ Municipal Permits Team to selectively abandon the abundant reasoning and guidance given in **Terra** by the Director in the interpretation, evaluation (of an identical fact pattern) of the requirements and compliance with 30 TAC § 312.44(c). Without rule modification and clarity, TCEQ staff are free (as it has been demonstrated) to cite no case history or any precedent for a recalculation of the 750 foot buffer after a new neighboring structure is built as contemplated **Terra**. The absence of rule modification requested permits Commission staff to simply dodge the constant compliance in all cases and opt for capricious enforcement.

Non-Compliance of the rule (as requested to be modified) can lead to disrupted peaceful enjoyment of property:

All property owners possess ownership rights which include the absolute right to the quiet, peaceful enjoyment of their land. The requested modification, and arguably clarification of 30 TAC § 312.44(c) would certainly better insure and safeguard such rights found in law and statute. The absence of protection of such rights constitutes and injury to land and an ongoing nuisance and trespass. The 750 foot buffer zone as plainly articulated by the Director in **Terra** was found to be a management practice intended to prevent public health nuisances and control the same. *See* **Terra**, Response 3. Such protection has not been present in the case of Registration No. 711013, as an example and perhaps others due in part to the relaxation of TAC § 312.44(c) and its ambiguity. **The absence of the buffer zone of 750 feet at all times can promote property damage and erode property rights of neighboring land owners.** No property owner should be subject to such injury to land or persons. The buffer zone equally applied at all times is needed to safeguard property and citizenry from injury.

Further the absence of the buffer zone of 750 feet at all times could restrict a neighboring land owner from exercising intended use of land, such as new construction and its location which impedes on property rights. In such case a neighboring land owner would essentially have to use their own property to create a buffer zone at all times which would be tantamount to a taking of property without compensation or due process.

Requirements to Maintain Buffer Zone under 30 TAC § 312.44(c)(1)

The existing buffer zone rules require a buffer zone around surface water of 200 feet for sludge or biosolids that are not incorporated into the land, and a buffer zone of 33 foot vegetative buffer zone if the sludge is incorporated. The 33 foot vegetative buffer zone is not adequate to protect those surface waters. Often due to heavy rains, storm water runoff aggravated by grade the sludge or biosolids are transported from the area of application prior to incorporation and end up in and impacting the adjacent surface water. Further, the vegetative buffer zone is often inadequate to hold the biosolids from the surface water located 33-feet away even following incorporation for such reasons or other reasons such as insufficient biosolid incorporation. For these reasons, the 33-foot buffer should be significantly enhanced to at least 100 feet to insure sufficient vegetation exists to hold the sludge or biosolids regardless of the timing or adequacy of incorporation of biosolids to ultimately protect the surface waters and natural recourses of the State.

Definition of "Harvesting"

30 TAC § 312.8(42) defines "Harvesting" as "any act of cutting, picking, drying, bailing, gathering, and/or removing vegetation from a field, or storing." Harvesting should be further clarified to include compliance with the spirit of the protection intended by inclusion of the of shredding. Such is necessary to prevent a facility from shredding "crop" in a shorter timeframe than what is allowed for the harvesting of its crops under 312.82 and thus circumvent the "beneficial use" concept the rule addresses. For example, 30 TAC § 312.82 (D) states: "food crops, feed crops, and fiber crops must not be harvested for at least 30 days after application of sewage sludge." If shredding is not considered "harvesting", a

facility can shred its crop at an interval that is less than 30 days, frustrate any beneficial land use simply run a sham disposal operation in the name of beneficial land use.

Respectfully submitted,

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